

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 7, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2007-62-M
Petitioner	:	A.C. No. 14-01597-100791
	:	
v.	:	
	:	Plant 4
NELSON QUARRIES, INC.,	:	
Respondent	:	

**DECISION BASED ON SUPPLEMENTED RECORD**

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). The Secretary filed a motion for summary decision in this case. The motion stated that there were no issues to be resolved at a hearing and the Secretary was entitled to summary decision as a matter of law. Nelson Quarries opposed the motion on the grounds that there are several material facts in dispute.

By order dated April 9, 2008, I denied the Secretary's motion, in part. Although I held that the Secretary was entitled to summary decision on the merits of the violation, I held that there were issues of fact remaining with respect to the gravity and negligence criteria. The parties have been unable to settle the case but they asked that I issue my final decision on the merits based on the existing record. The record includes affidavits, responses to discovery, photographs, and other documents. I agreed to rule on all remaining issues in a written decision. As a consequence, Respondent's previously filed motion for settlement of case, dated June 16, 2008, is **DENIED**.

On May 31, 2006, MSHA Inspector Richard Tedesco issued Citation No. 6332035 alleging a violation of section 56.9200(d). The citation provides, in part, as follows:

Miners were being transported on the back of the 988F front-end loader c/n 016 while the loader was in motion. There were no provisions made on this loader to transport anyone except the loader operator.

The inspector issued an imminent danger order in conjunction with this citation. The safety

standard provides that “persons shall not be transported . . . outside cabs, equipment operators’ stations, and beds of mobile equipment, except when necessary for maintenance, testing or training purposes, and provisions are made for secure travel.” The inspector determined that a fatal injury was highly likely, that the violation was significant and substantial (“S&S”), and that the company’s negligence was moderate. The Secretary proposed a penalty of \$1,100.00 under her special assessment regulation at 30 C.F.R. §100.5.

While conducting an inspection at Plant 4, Inspector Tedesco observed a miner driving a loader with two employees riding on the back of the loader. The employees were not in the cab and were sitting behind the cab. There were no seats or seatbelts provided for these employees. Inspector Tedesco issued a verbal imminent danger order and instructed the miners to get off the loader. The miners riding on the back of the loader were not engaged in testing or training activities and, in any event, there were no suitable provisions made for secure travel. Inspector Tedesco determined that the violation was S&S and that the company’s negligence was moderate because it had instructed miners not to ride on the back of equipment.

As I stated in my summary decision order, I find that the Secretary established a violation of 56.9200(d). Nelson Quarries conceded as much given that the Mine Act has been construed as a strict liability statute. The remaining issues are the gravity, including the S&S designation, and negligence criteria.

## **I. GRAVITY OF THE VIOLATION**

Nelson Quarries contends that the violation was neither serious nor S&S because the loader was traveling over smooth terrain, there was little change in elevation on the route traveled by the loader, the loader was traveling at a slow speed for a short distance, and the miners were behind the railing on the back of the loader. The Secretary argues that “the danger of riding on equipment, outside the loader’s cab, poses a significant and substantial hazard regardless of the nature of the terrain upon which the vehicle travels” or other site-specific factors. (S. Reply to Resp. Opposition to Sum. Dec.). I denied the motion for summary decision because I determined that the environmental factors cited by Nelson Quarries are directly related to the gravity criterion. I rejected the Secretary’s argument that the violation should automatically be classified as S&S.

In his affidavit, Inspector Tedesco testified that the two employees were about nine feet above the ground and about three and a half feet above the top of the loader’s rear tires. Affidavit ¶ 4. He stated that the men were “sitting behind [the handrails on the loader] and were therefore not afforded any protection by the rails.” *Id.* The men were sitting on the engine cover for the loader. There were no seatbelts or other restraining devices provided. The inspector also testified that “the terrain they were traveling at the time I observed them was bumpy and rutted with elevation changes of approximately 15 feet.” *Id.* at ¶ 6. He said that he designated the citation as S&S because “a fall from such elevation under such conditions was reasonably likely to occur and could lead to a serious and/or fatal injuries.” *Id.*

Nelson Quarries submitted the affidavit of Eugene Andres, who accompanied Tedesco during the inspection. He testified that Nelson Quarries was in the process of assembling the plant at the time of the inspection. Affidavit ¶ 4. He further testified that the miners were “riding behind the cab of the loader, seated on the engine hood, with their feet on the loader platform.” *Id.* at ¶ 10. The miners were “hanging onto the platform railing and facing forward.” *Id.* at ¶ 11. The loader was “moving very slowly, in low gear, coming out of the water.” *Id.* at ¶ 12. The pit had about two feet of water in it at the time of the violation and the loader was returning from a water pump installed to remove the water. *Id.* at ¶ 9. The miners had been checking fluid levels and performing maintenance on the pump. *Id.* at ¶ 16. They were returning at the time the citation was issued. Miners are required to ride in trucks when moving about the plant but “the water was too deep for the pickup to travel to the pump.” *Id.* at ¶ 15. The miners told Andres that they considered riding in the loader bucket but “because of safety concerns, thought it better to climb up on the loader platform where it would be safe.” *Id.* at ¶ 17. The miners rode “a distance of 200 feet to the pump and 200 feet away from the pump over fairly smooth terrain and at a low speed.” *Id.* at ¶ 18. “They did not cross ground that was bumpy and rutted and involved a 15 foot change in elevation as stated in the Inspector’s affidavit.” *Id.*

The evidence conflicts in several respects. The parties disagree as to the condition of the terrain. It is not entirely clear where Inspector Tedesco was looking when he determined that the terrain was bumpy and rutted. Nelson Quarries submitted several photographs of the area where the citation was issued. (Attachment to Nelson’s Response to Motion for Summary Decision). It is not entirely clear when the photos were taken, but it is clear that the water had been mostly drained. The photos reveal that the entire area is mostly smooth with only a slight grade. I credit the testimony of Mr. Andres on this issue. Based on his affidavit testimony and the photographs, I find that the terrain was mostly smooth. I also find that the loader was traveling at a low rate of speed and there was only a slight elevation change. The two miners were sitting on the engine hood behind the cab and their feet were on the platform. They were holding onto the platform railing. Photographs provided by Nelson Quarries show the loader hood, platform, and the railings. *Id.*

A violation is classified as S&S “if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June

1996).

I find that although the Secretary established the first, second, and fourth element of the *Mathies* S&S test, the third element was not established. The preponderance of the credible evidence convinces me that it was not reasonably likely that the hazard contributed to by the violation would result in an injury. Simply put, it was highly unlikely that any of the miners riding outside the cab of the loader would fall off the loader or would otherwise injure themselves while they were on the loader. The terrain was relatively smooth, the loader was traveling at a low rate of speed, and the distance traveled was less than a tenth of a mile. Consequently, the inspector's S&S determination is vacated. In addition, the inspector's gravity determinations are modified as follows: the likelihood of an injury is modified to "unlikely," the type of injury that reasonably could be expected if there were an accident is reduced to "lost workdays or restricted duty." Given the environmental factors discussed above, it is unlikely that anyone would suffer a fatal injury as a result of this violation.

## **II. NEGLIGENCE OF THE MINE OPERATOR**

Nelson Quarries argues that its negligence should be reduced to low because the two employees violated a written company policy. It claims that it did everything it could do to let its employees know that they "were not permitted to engage in this cited behavior." (Nelson Response to Sec'y Motion for Summary Decision at 2). The Secretary contends that the inspector's designation of moderate negligence was appropriate because Nelson Quarries knew or should have known of the violation but there were some mitigating circumstances.

I affirm the inspector's moderate negligence determination. The company's written policy states that "[u]nder no circumstances shall any person ride in a loader bucket or on the loader while it is moving." (Attachment to Nelson's Motion for Settlement of Case). Nevertheless, the operator apparently did not have any means for the three employees to reach the pump for servicing except to have two of them ride outside the cab of the loader. These two employees believed that, under these circumstances, the safest way for them to reach the pump was to ride on the outside of the loader. The employees had little choice but to violate the policy. This constitutes moderate negligence on the part of Nelson Quarries.

## **III. APPROPRIATE CIVIL PENALTIES AND ORDER**

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Plant 4 had a history of about 30 violations in the two years prior to May 31, 2006, based on my two decisions following the June 2007 hearing. Most of these previous violations were non-S&S. Nelson Quarries is a rather small operator and its quarries are small. The violation was abated in good faith. Nelson Quarries did not establish that the penalties assessed will have an adverse effect on its ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalty of \$150.00 is appropriate for this citation.

Accordingly, Citation No. 6332035 is **MODIFIED** as set forth above and Nelson Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$150.00 within 40 days of the date of this decision. Payment should be sent to: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.

Richard W. Manning  
Administrative Law Judge

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